UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SALEM HOSPITAL CORPORATION a/k/a MEMORIAL HOSPITAL OF SALEM COUNTY	:	Case No. 04-CA-64458
and	:	
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES (HPAE)	:	

EMPLOYER'S REPLY TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

As the Employer in the above-captioned case, Salem Hospital Corporation a/k/a Memorial Hospital of Salem County (hereafter, "Salem" or the "Hospital") hereby submits, pursuant to §102.46 of the Board's Rules and Regulations, as amended, the following Reply to Counsel for the Acting General Counsel's Answering Brief, dated May 16, 2012.[1]

ARGUMENT

The General Counsel's Answering Brief to the Hospital's Exceptions grossly fails to account for the Union's shortcomings in its preparation of the information request involved in the instant case. The General Counsel's attempts to provide,

[1] For the relevant procedural and factual background in this case, the Employer respectfully refers the Board to its Post-Hearing Brief in this case, filed on April 5, 2012, as well as the Employer's Brief in Support of Exceptions to the Decision of Administrative Law Judge Robert A. Giannasi, filed on May 15, 2012.

on behalf of the Union, a reasoned explanation for its overly broad and unduly burdensome requests for information, including requests for confidential, non-bargaining unit information, must fail upon the facts of this case. Furthermore, the General Counsel's attempts to rationalize the Union's inability to create a properly tailored and specific information request cannot be allowed to stand as the rationale by which the Hospital is required to provide the requested information to the Union. Finally, the General Counsel's ongoing refusal to acknowledge the impact of the Hospital's argument concerning the invalidation of the Healthcare Rule under Specialty Healthcare is only further exhibited by the General Counsel's Answering Brief.

1.) The General Counsel Continues to Fail to Establish the Union's Entitlement to the Requested Information

At the outset, the General Counsel must not be allowed to complete, by way of its Answering Brief, Administrative Law Judge Robert A. Giannasi's (hereafter, "ALJ Giannasi") review of the information requested by the Union. Put another way, the General Counsel's detailed accounting and legal defense of the information requested cannot stand in place of the kind of detailed review, which the Hospital alleged in its Exceptions, ALJ Giannasi should have completed as part of rendering his Decision. As the Hospital explained in its Exceptions, ALJ Giannasi clearly failed to conduct a full and complete review of the nature of the information requested by the Union. Therefore, although the General Counsel's

Answering Brief contains a detailed analysis of the Union's information request, even setting aside for the moment the lack of validity of the General Counsel's argument altogether, the General Counsel simply cannot, by way of its Answering Brief, review and argue the case on behalf ALJ Giannasi. ALJ Giannasi's failure to adequately review and consider the information request is an error that must be addressed and remedied by the Board.

Moving next to the substance of the argument, the General Counsel has failed to establish that the Union is entitled to the voluminous amount of information requested in this case. First, the General Counsel admits that, as concerns the non-bargaining unit information sought by the Union in this case, the Union is required to meet the burden to establish the relevance of the requested information. (Answering Brief p. 5) Despite the General Counsel's best attempts to minimize the nature of this burden upon the Union, the General Counsel has continued to fail to establish the relevance of Union's request for the information concerning agency employees hired by the Hospital. Not only is this information confidential in nature, as the Hospital has already explained in its Post-Hearing Brief, but the information is simply not relevant to the Union's duty to fulfill its role as the collective bargaining representative of employees at the Hospital.

The General Counsel's attempt to elicit testimony on this subject, and later explain the relevance of the information in its Answering Brief, must fail as a

simple matter of logic. First the General Counsel claims that the information sought by the Union concerning agency employees is presumptively relevant under Pavilion at Forrestal Nursing, 346 NLRB 458 (2006). However, even the General Counsel seems to admit in its Answering Brief that this is an inaccurate reliance upon Pavilion, given the facts of the instant case. In Pavilion, the Board held that information regarding temporary workers **performing bargaining unit work** was presumptively relevant. Id. at 463. However, in this case, the Union broadly sought the "Total number of house worked by Agency staff", as well as "a list of all Agency staff currently working and a copy of their contracts." (Information Requests Nos. A3 & A4) Certainly, the information request at issue in this case is much broader than the presumptively relevant information sought in Pavilion, and any attempts to provide a post-hoc explanation or narrowing of the information requested accomplished by the General Counsel in its Answering Brief cannot be allowed to stand. Therefore, because the information was not presumptively relevant, the Union was under the burden to prove the information's relevance.

Next, the General Counsel attempted to prove relevance by arguing that the Union required information concerning the employment of agency nurses in order to establish bargaining proposals for the bargaining unit. (Answering Brief p. 8) However, the General Counsel failed to provide any explanation for how or why the information concerning temporary, agency workers, as a general class, would

be relevant to the working conditions of bargaining unit employees. By the very nature of the distinctions of their position, temporary employees are excluded from the bargaining unit. It stands to reason, therefore, that information concerning their distinguishable working conditions would have no relevance to the Union's bargaining proposals. The Board may not simply allow the Union to assert such a transparent reason for its information request to stand as the entirety of the Union's showing of relevance. The General Counsel's argument, raised in its Answering Brief, that the Union sought only the information about those agency employees who were working in bargaining unit positions misconstrues the evidence – while Ms. Lane did testify that agency nurses would work in bargaining unit positions, the Union's information request was not so narrowly tailored. Accordingly, the Union's broad information request for information concerning agency employees cannot stand, not only for the confidentiality reasons asserted by the Hospital previously, but also because the General Counsel has failed to establish the requisite relevance of the information sought by the Union.

Finally, on a related note, the General Counsel's Answering Brief is unable to contend with the Hospital's argument that the Union's information request was overly broad. It is clear from the testimony elicited at the Hearing before ALJ Giannasi that the Union could have created a more narrowly tailored information request. In fact, Union representative Sandra Lane testified, in essence, that the

written information request captured more information than the Union was actually intending to seek in the case. As concerned a number of the particular requests, Lane testified that the Union sought information for bargaining unit members only – though its written information request did not, in any way, specify this limitation on the information sought. (See Hearing Transcript pp. 19-20) As the Hospital explained in its Post-Hearing Brief, the Hospital cannot be expected to guess at what information, in fact, the Union was seeking, and it was under no obligation to provide information concerning non-bargaining unit employees absent a showing of relevance by the Union. The General Counsel fails to even address this obvious shortcoming by the Union in its Answering Brief, other than to state that the Union's intent was "reasonably inferable" from its information request (Answering Brief p. 7), a weak assertion that falls short both factually and legally. The Union had an obligation at the outset to make its information request clear and narrowly tailored, and it failed to do so. Instead, the Union sent the Hospital what it has now effectively admitted was an overly broad information request, expecting the Hospital to have divined the Union's intent as to the information it actually desired. The Board should not countenance the Union's efforts to provide a post-hoc alteration to the information request by way of the testimony provided at the hearing on the charge, and therefore the Board should find that the Union's information request was overly broad on its face.

2.) The General Counsel Continues to Refuse to Acknowledge the Import of the Board's Decision in Specialty Healthcare

In its Answering Brief, the General Counsel continues to emphasize the fact that the Board's decision in Specialty Healthcare involved a non-acute healthcare employer, as though this single fact erases any applicability that the case might have for other employers who fall under the Board's jurisdiction. The law's ongoing reliance upon precedent is rarely so simple. On occasion, to be certain, a case will be found that is squarely on point and directly analogous to the case at bar. However, it is far more often the case that the underlying rationale and holdings from a case, notwithstanding the particular facts of that case, form the basis for one case's applicability in the next case – again, regardless of the fact that the two cases are not entirely factually analogous.

Such is the case as concerns Specialty Healthcare: Though the Hospital freely admits that Specialty Healthcare involves a set of facts centered upon a bargaining unit at a nursing home, a non-acute healthcare facility, the Hospital argues that the Board's analysis, and even more so, the Board's sharp criticism of the Healthcare Rule made throughout the course of its decision in Specialty Healthcare seriously call into question the ongoing validity and application of the Healthcare Rule in the acute healthcare industry. Though the Board may not have explicitly modified or overturned the Healthcare Rule in Specialty Healthcare, the Board's Decision calls into question the very legal underpinnings upon which the Healthcare Rule is

based. Accordingly, it is simply not sufficient for the General Counsel to point to the factual differences between this case and Specialty Healthcare in order to entirely write off the applicability of the legal findings of the Board in Specialty Healthcare to the case at bar. Thus, while the General Counsel choses to attack Salem with inaccurate, and frankly, unprofessional accusations of delay (see Answering Brief, page 17), the fact is that, undeniably, Specialty Healthcare came with a "ripple effect," which Salem is now asking the Board to confront head-on.

Furthermore, the General Counsel's contention that Salem should have raised its defense under Specialty Healthcare as part of the earlier refusal to bargain proceedings, which are now before the DC Circuit, entirely ignores, and therefore arguably acquiesces to, the Hospital's argument in its Brief in Support of Exceptions concerning the interplay of the reality of litigation and responsible case development (Answering Brief p. 13) This argument fails to appreciate that the Hospital's attorneys required a fair opportunity to review and analyze the implications of the Board's decision in Specialty Healthcare, as well as to investigate the changes the acute care industry has experienced since the promulgation of the Healthcare Rule roughly twenty-three years ago, in order to prove that changes in the industry have had an equal impact in the acute care industry. Such a survey of an industry requires a considerable amount of time, and the Hospital simply could not have completed such work by the time the Board

issued its November 2011 Decision, a mere two months after Specialty Healthcare had issued. Accordingly, the Board's Decision in Specialty Healthcare gave rise to special circumstances, which under Pittsburgh Plate Glass entitle the Hospital to an opportunity to raise its defense.

Additionally, the General Counsel argues in its Answering Brief that the Hospital did not need to wait for the Board's Decision in Specialty Healthcare to question the validity of the Healthcare Rule. (Answering Brief p. 15) However, the General Counsel fails to appreciate that it is the Board who called into question the validity of its own Rule and the agency never gave the labor law community any prior reason to believe the agency would be swayed to revisit its unit determination jurisprudence based upon industry change. The General Counsel's position that Salem should have pursued, from the beginning, a defense based upon industry change would resign Salem, and by extension, all parties participating in proceedings before the Board, to a "guessing game" in terms of the factors the Board deems relevant as part of its reflections upon and revision to federal labor law.

Finally, the General Counsel attempts to attack the Hospital's Offer of Proof offered before ALJ Giannasi in support of the Hospital's defense under Specialty Healthcare. The General Counsel's Answering Brief faults the Hospital's Offer of Proof for consisting "mostly of legal argument" and for lacking "factual

presentation". (Answering Brief p. 16) The General Counsel's vision of an offer of proof goes too far. The Hospital was not obligated to give a line-by-line accounting of witnesses' expected testimony or a document-by-document review of the expected documentary evidence. Indeed, given the complexity of the Hospital's defense, such an expectation on the part of the General Counsel is particularly unreasonable in the case at hand. In any case, these arguments are entirely beside the point. The simple fact of the matter is, as the Hospital explained in its Exceptions, that ALJ Giannasi should have provided the Hospital with an opportunity to develop its defense under Specialty Healthcare. For the General Counsel to criticize the content of the Offer of Proof misses the forest for the trees – the Hospital was not required to make an in-depth showing of every piece of evidence that it would present if given the opportunity to do so, but rather, the Hospital summarized the Hospital's intended argument for ALJ Giannasi to consider. It is also notable that ALJ Giannasi, for his part, did not state he found Salem's Offer of Proof to be lacking in detail. That ALJ Giannasi failed to permit the Hospital to develop the evidence reference in its Offer of Proof is the true error in this case.

CONCLUSION

For the foregoing reasons, the Hospital respectfully requests that the Board overturn the decision of Administrative Law Judge Robert A. Giannasi.

Dated: June 12, 2012
West Hartford, Connecticut

Respectfully Submitted,

Kaitlin Brundage

Kaitlin K. Brundage, Esq.
Attorney for Salem Hospital Corporation
a/k/a Memorial Hospital of Salem County
62 Ledgewood Road
West Hartford, Connecticut
(860) 307-3223
brundagekk@gmail.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SALEM HOSPITAL CORPORATION a/k/a MEMORIAL HOSPITAL OF SALEM COUNTY	:	Case No. 04-CA-64458
and	:	
HEALTH PROFESSIONALS AND ALLIED EMPLOYEES (HPAE)	:	

CERTIFICATE OF SERVICE

The Undersigned, Kaitlin K. Brundage, Esq., being an Attorney duly admitted to the practice of law, does hereby certify that, pursuant to 28 U.S.C. §1746, that the Employer's Brief in Support of Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi was e-filed on Tuesday, June 12, 2012 with the National Labor Relations Board through the website of the National Labor Relations Board (www.nlrb.gov).

The Undersigned does hereby certify that, on June 12, 2012, a copy of the Employer's Brief in Support of Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi was served by email upon the following:

William Slack, Jr.

Counsel for the Acting General Counsel

National Labor Relations Board, Region 4
615 Chestnut Street, 7th Floor
Philadelphia, Pennsylvania 19106
William.Slack@nlrb.gov

The Undersigned does hereby certify that, on June 12, 2012, a copy of the Employer's Brief in Support of Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi was served by email and overnight carrier upon the following:

Lisa Leshinski, Esq.
Attorney for the Charging Party
Health Professionals and Allied Employees
208 White Horse Pike
Haddon Heights, New Jersey 08035

Dated: June 12, 2012
West Hartford, Connecticut

Respectfully Submitted,

Kaitlin Brundage

Kaitlin K. Brundage, Esq.
Attorney for Salem Hospital Corporation, a/k/a Memorial Hospital of Salem County
147 Loomis Drive
West Hartford, Connecticut 06107
(860) 307-3223
brundagekk@gmail.com